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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

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No. 72-737

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PAUL WEISS,

Petitioner,

against

REVEREND MICHAEL WALSH, et al.,

Respondents.

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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# BRIEF FOR RESPONDENTS WALSH, REISS AND ROTH IN OPPOSITION TO THE PETITION

---

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December 18, 1972

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On Petition for a Writ of Certiorari
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for the Second Circuit

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# BRIEF FOR RESPONDENTS WALSH, REISS AND ROTH IN OPPOSITION TO THE PETITION

---

## Opinions Below

The opinion of the United States District Court for the Southern District of New York (Tyler, J.), dated February 24, 1971, denying Petitioner's motion for a preliminary injunction and granting in part Respondents' motion for a judgment on the pleadings is contained in Petitioner's Appendix at page A-1. The result of the second part of this decision was to dismiss portions of Petitioner's original com-

plaint (Petitioner's Appendix, page A-64) and to give him leave to replead. A second complaint was served by Petitioner on March 16, 1971 and is set forth at page A-7 of the Appendix to this brief.

The opinion of the United States Court of Appeals for the Second Circuit (Mansfield, J.), dated October 29, 1971, affirming the February 24, 1971 opinion of the District Court is set forth at page A-1 of the Appendix to this brief.

The opinion of the United States District Court for the Southern District of New York (Tyler, J.), dated January 7, 1972, denying Respondents' motion for summary judgment is set forth at page A-10 of Petitioner's Appendix. This decision also struck Petitioner's jury demand because it was filed too late and denied Petitioner's request for a jury trial notwithstanding his failure to make a proper demand.

The opinion of the same District Court (Tyler, J.), dated March 7, 1972, after trial is set forth at page A-23 of Petitioner's Appendix. This opinion was filed by the trial court as its findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

The March 7, 1972 opinion of the District Court was affirmed without opinion by the United States Court of Appeals for the Second Circuit on

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June 29, 1972. On August 29, 1972 the Court of Appeals denied Petitioner's motion for rehearing in banc.

## Jurisdiction

Jurisdictional requisites are adequately set forth in the Petition.

## Questions Presented

Does the factual finding of the District Court, unanimously affirmed by the Court of Appeals, that there was no discrimination in employment against Petitioner because of his age of 69 raise a substantial question which requires review on certiorari by the Supreme Court of the United States?

## Statutes Involved

The statutes involved in this case are the Age Discrimination in Employment Act of 1967, 81 Stat. 602, 29 U.S.C.A. §621 et seq. and the New York Executive Law §296 (McKinney 1972). Their pertinent text is as follows:

### Age Discrimination in Employment Act of 1967
29 U.S.C.A., Chapter 14

§ 623. Prohibition of Age Discrimination - Employer Practices

(a) It shall be unlawful for an employer -

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

* * *

§ 631. Age Limits

The prohibitions in this chapter shall be limited to individuals who are at least forty years of age but less than sixty-five years of age.

New York Executive Law

§ 296. Unlawful Discriminatory Practices

3-a. It shall be an unlawful discriminatory practice:
(a) For an employer or licensing agency, because an individual is between the ages of forty and sixty-five, to refuse to hire or employ or license or to bar or to terminate from employment such individual, or to discriminate against such individual in promotion, compensation or in terms, conditions or privileges of employment.

* * *

But nothing contained in this subdivision or in subdivision one of this section shall be construed to prevent the termination of the employment of any person who is physically unable to perform his duties or to affect the retirement policy or system of any employer where such policy or system is not merely a subterfuge to evade the purposes of said subdivision; nor shall anything in said subdivisions be deemed to preclude the varying of insurance coverages according to an employee's age.

Statement of the Case

Petitioner, Paul Weiss, was a professor of Philosophy at Yale University until June of 1969, when he was required to retire at age 68 pursuant to that University's mandatory retirement policy. In anticipation of retirement, during 1968 Petitioner entered into negotiations with a number of universities in an

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attempt to secure a teaching position to commence in September of 1969.

In January and February of 1968 officials at Fordham University offered Petitioner a new teaching position at Fordham which was to be designated a "University Professorship" and was to commence in September of 1969. Petitioner rejected this offer, indicating to Fordham that he desired more money and a longer contract than was offered.

Also in early 1968, Fordham hoped that it might regain its state-funded "Schweitzer Chair" by September of 1969. The Schweitzer Chair was not related to the University Professorship, and the funds from the State were at that time unavailable because of a ruling by the State Attorney General that Fordham was ineligible to receive them because of its alleged religious affiliation. Fordham was contesting this ruling.

In April of 1968, Fordham faced serious financial difficulties and found it necessary to withdraw its offer to Petitioner of the University Professorship. In the same April 22, 1968 letter in which an official of Fordham withdrew the offer (which Petitioner had never accepted), Fordham informed Petitioner that it was then its intention to offer Petitioner the Schweitzer Chair nomination if

the Chair were returned to Fordham. (Petitioner's Appendix, page A-54).

Fordham at no time ever offered the Schweitzer Chair to Petitioner; three letters to Petitioner in April of 1968 mention the possibility of nominating him for the Chair in September, 1969. Petitioner's interest in the status of the Chair and the possibility that it might be offered to him for September of 1969 continued during the summer of 1968.

In September of 1968, a professor at Fordham wrote Petitioner that it appeared that Fordham would not be able to have a Schweitzer professor for September, 1969, and advised him to accept some other offer. Petitioner responded on October 1, 1968 that he had a firm offer for another post, which he would undoubtedly accept in a few weeks.

In December of 1968 Petitioner accepted a teaching position at Catholic University, and entered into a contract for a term of five years. There were no further communications between Petitioner and Fordham officials concerning the Schweitzer Chair until late summer of 1970. By that time Fordham had regained the Schweitzer Chair and was considering other candidates (Petitioner's Appendix, page A-41). Also, a new group of individuals occupied the key university administrative positions. A friend of Petitioner's on

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the faculty brought to the attention of the new Fordham administration that Petitioner had been considered for the Schweitzer Chair two and one-half years earlier. He told Fordham's officials that Petitioner knew the Chair was now available and was still very interested in being chosen for it. The Academic Vice President decided to inform Petitioner, in a diplomatic manner, that he was no longer being considered for the Schweitzer Chair. This official did so inform Petitioner, and gave age as the reason as a device to "cushion the blow", rather than the true fact that the Fordham Philosophy Department felt that other candidates were more suitable in view of the "needs and objectives of Fordham". (Petitioner's Appendix, page A-43).

Petitioner instituted this action of October 29, 1970, alleging that Fordham had withdrawn an offer of the Schweitzer Chair "solely on the basis of age". Petitioner (born in May, 1901) claimed this constituted unlawful and unconstitutional age discrimination for which he was entitled to legal and equitable relief. Petitioner did not allege a contract or a breach of contract in his original complaint (Petitioner's Appendix, page 64).

In February of 1971 all Respondents moved for a judgment on the pleadings, and Petitioner cross-

moved for a preliminary injunction. Petitioner's motion was denied, and the District Court dismissed the complaint, but permitted Petitioner to file an amended complaint pleading breach of contract, selective enforcement of an age criteria, and exceeding statutory authority. Petitioner thereafter filed an amended complaint (Appendix hereto, page A-7) along these lines, demanding $1,000,000 damages, a judgment that Respondents violated his rights under the Fourteenth Amendment and under 42 U.S.C. § 1983 in failing to award him the Schweitzer Chair, and a permanent injunction requiring Respondents to give him the Chair "until he chooses to retire from it".

Petitioner then appealed from the denial of his motion for a preliminary injunction. While that appeal was pending, Petitioner in July, 1971, again moved the District Court for a preliminary injunction, this one regarding Fordham's use of the Schweitzer funds. This motion was denied. Petitioner filed a second interlocutory appeal, which was consolidated with the first. In an unreported decision dated October 29, 1971, the Court of Appeals rendered an opinion affirming both decisions (Appendix hereto, page A-1).

Petitioner filed his original complaint on October 29, 1970, which Respondents answered with denials on December 14, 1970. The amended complaint

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was served on March 16, 1971 and answered on March 26, 1971 with similar denials. Petitioner's demand for a jury trial was not filed until July 21, 1971. In a memorandum decision dated January 7, 1972, the District Court granted Respondents' motion to strike the jury demand as not timely filed. The court also denied plaintiff's oral request at argument that a jury trial be had despite the absence of a timely demand. The January 7, 1972 decision also denied a motion by Respondents for summary judgment because of possible material fact issues.

This action was tried in the United States District for the Southern District of New York before Judge Harold R. Tyler, Jr. in March 1972. Following a full trial on the merits, the District Court found that neither Fordham nor any agent of the State of New York had discriminated against Petitioner because of his age; that Petitioner did not establish any breach of contract; that Petitioner did not establish any inducement to change his position entitling him to equitable relief; that Petitioner did not establish any denial of equal protection; and that Petitioner did not establish any arbitrary or discriminatory application of any law by the State of New York (Petitioner's Appendix, pages A-23-51). The District Court thus dismissed the complaint on its merits.

The Court of Appeals for the Second Circuit affirmed without opinion, and denied Petitioner's request for an in banc rehearing.

Petitioner here disputes the factual determination rendered by the District Court and affirmed by the Court of Appeals that there was no age discrimination practiced against Petitioner, and he seeks to have this Court review that finding on certiorari. This is a key element in Petitioner's whole argument, for on it is hinged whether a Constitutional issue could even be present in the decision below.

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## Reasons for Denying Writ

### POINT I

### The Record Does Not Support Petitioner's Factual Claim of Age Discrimination

The Petition is based upon Petitioner's conclusory factual allegations that he was unlawfully discriminated against because of age. This factual claim is not supported by the record before this Court. Petitioner urges this Court to review the decisions below and to entertain his argument that discrimination in employment on the basis of age is unconstitutional, whether in general or against Petitioner selectively. Respondents submit that this Court should deny the Petition for the reason that the hypothetical proposition of law urged by Petitioner was rendered unnecessary at trial and is academic at this point.

Prior to discovery and trial, and shortly after the suit was initiated, all of the Respondents moved for judgment on the pleadings on the grounds that the original complaint (Petitioner's Appendix, page A-64) failed to state a claim for which relief could be granted. The District Court granted this motion in part, and its opinion reflects its determina-

tion, viewing the facts most favorably for the Petitioner, that Petitioner's theory that age discrimination in employment is unconstitutional or somehow unlawful, was totally lacking in legal merit (Petitioner's Appendix, pages A-1 through A-9). However, with leave of Court, Petitioner filed an amended complaint in which he pleaded unconstitutionally selective age discrimination as well as breach of contract.

At trial, Petitioner attempted to prove selective discrimination, that is, that he alone was discriminated against because of his age while others similarly situated were not. Of course, it was first necessary for him to prove that he indeed was the victim of age discrimination. Therefore, at trial Petitioner presented all of the evidence he could produce in support of his general claim of age discrimination. Nevertheless, Petitioner was unable to prove any age discrimination, general or selective, and the Court found specifically that "Fordham University did not discriminate in terms of age" (Petitioner's Appendix, page A-47). In addition, the Court specifically found that "There is no evidence direct or indirect of any discrimination express or implied, witting or unwitting on the part of the Board of Regents or the State Commission of Education." (Trial Record, pages 500-501.) Accordingly,

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Petitioner's discrimination claim failed solely because of the trial court's factual determination. And in the final decision after trial it was never necessary for either the District Court or the Court of Appeals to consider the question of the constitutionality the alleged age discrimination, whether selective or non-selective, and thus they did not consider the question. This is consistent with decisions of this Court which hold that where the resolution of a question is not necessary for a decision in a matter at bar, it need not be answered. U.S. v. Worley, 281 U.S. 339, 340 (1930). See also, Walters v. City of St. Louis, 347 U.S. 231 (1954). This reason alone warrants denial of the Petition.

The record fully supports the Court's factual finding that Petitioner was not the victim of age discrimination, and was never even under consideration by Fordham for the Schweitzer Chair in 1970 when Fordham was again able to nominate a candidate for that position, and when the alleged discrimination was claimed to have occurred. The record confirms the finding that Fordham only contacted Petitioner in 1970 motiviated by "good faith and indeed unusual sympathy" to inform him that he was not in consideration as a possible nominee for the Schweitzer Chair at that time (Petitioner's Appendix, page A-44 through A-47).

This Court has uniformly refused to grant certiorari to review such factual determinations, United States v. Johnson, 268 U.S. 220, 227 (1925), particularly where there are concurrent findings by the District Court and the Court of Appeals. Berenyi v. District Director, Immigration and Naturalization Service, 385 U.S. 630, 635 (1966); and Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271, 275 (1949), opinion on rehearing, 339 U.S. 605 (1950).

## POINT II

### Even If Petitioner Had Been Able to Prove Age Discrimination, Petitioner's Claim Would Nevertheless Fail to State a Cause of Action Under the Constitution

Respondents submit that the novel proposition of law put forth by Petitioner is hypothetical and assumes facts contradicted by the findings of the trial court and not supported by the record. Nevertheless, even if Petitioner had been able to prove his allegations of age discrimination, he still would not state a claim under the Federal Constitution.

At common law, the relation of employee and employer is entirely a matter of contract, freely and voluntarily entered into by employer and employee. Adair v. United States, 208 U.S. 161, 184 (1908); NLRB v. Knoxville Pub. Co., 124 F.2d 875 (6th Cir.

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1942). The employer has the absolute right to select whatever employees he wishes, and to hire or refuse to hire in his uncontrolled discretion. Reinforce Inc. v. Birney, 308 N.Y. 164, 124 N.E.2d 104 (1954).

Plaintiff's Constitutional claim is unsubstantial and plainly without merit. The Constitution does not generally create any right to continued employment. Hopkins v. Wasson, 227 F.Supp. 278 (E.D. Tenn. 1962), aff'd, 329 F.2d 67 (6th Cir. 1964), cert. denied, 379 U.S. 854 (1964). In Carraway v. Jefferson Parish School Board, 251 F.Supp. 462 (E.D. La. 1966), the Court held, at page 465:

> "[T]here is a protected 'right to employment' only where Congress or the Courts find that such a right is necessary to the preservation or effectuation of some other constitutional or statutory right. Employment per se is not a protected right; the due process clause of the fourteenth amendment is inapplicable to dismissals from employment, even from public employment, because there is nothing for it to operate on and prevent deprivation of."

Mere form of words alleging a violation of the Constitution and labelling the suit as one to enjoin unconstitutional discrimination is insufficient to state a cause of action without some support for the complaint in fact or law.

Petitioner's citations are not in point. They are cases which concern interference with basic constitutional rights. Here there is no constitutionally protected right to be free from

discrimination based upon age. Never has equal protection or due process been given such an interpretation, particularly where federal and state legislation cover the issue and it was not deemed necessary by the respective legislatures to enact special protections for those beyond a certain maximum age.

The Petition on its face clearly indicates the absence of any constitutional prohibition of age discrimination, and its quotation of a passing dictum from Gulf, C. & S. F.R.Co. v. Ellis, 165 U.S. 150 (1897) appears to be the only legal authority which Petitioner can muster. The sole issue in that case was the constitutionality of a Texas statute which awarded attorney's fees to certain plaintiffs who brought successful claims against railway companies. The language cited by Petitioner at page 15 of the Petition was extracted from examples given by the Court of the arbitrariness of awarding attorneys fees to one group of defendants and not to another.

More relevant is the recent decision in Oregon v. Mitchell, 400 U.S. 112 (1970) in which the Court was faced with the "Voting Rights Act Amendments of 1970", which, in effect, declared that the States could not discriminate against persons over 18 and deny them their fundamental right to vote in State elections solely because of their age, i.e., because

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they had not yet reached the age of 21. The Court determined that the Fourteenth Amendment could not even support this affirmative legislative action by Congress to halt claimed denials of equal protection in the form of age discrimination in state and local elections. Given this ruling, it is apparent that the Fourteenth Amendment will not support Petitioner's request below for judicial relief from the alleged employment discrimination based on age.

Petitioner's claim ignores the extensive body of statutes which have found age to be a reasonable basis for classifying and regulating conduct. It also ignores the reasoned findings of the United States Congress and of the New York Legislature, which both have passed positive legislation prohibiting age discrimination in employment, but explicitly limiting this protection to persons between 40 and 65. The pertinent provisions of these statutes are set forth below at "Statutes Involved". The deliberations of Congress, the New York Legislature (and indeed almost all of the states*) directly rebut Petitioner's

* At least sixteen states in addition to New York have positive legislation prohibiting age discrimination in employment but explicitly limiting this protection to persons under a specified age, which is in no use over 65. See CCH Employment Practices Guide, State Laws on Discrimination on Account of Age, ¶20,100 - ¶28,902.

arguments that there is no rational ground for the application of uniform mandatory retirement rules by an employer. The fact that Petitioner and others who are over 65 main remain at a relative disadvantage because of such remedial statutes does not mean that they are necessarily denied equal protection. James v. Valtierra, 402 U.S. 137, 142 (1971). It is well established that only "irrational discrimination" is precluded by the equal protection clause. A statute is not invalid under the Constitution because it might have gone further than it did. Goesaert v. Cleary, 335 U.S. 464, 466 (1948).

Therefore, even if it had been necessary to resolve the legal question raised by the Petitioner as part of the final decision below, respondents submit that the issue is clearly lacking in merit and not a question of importance which is in the public interest to be decided by this Court. This is particularly the case where no Circuit Court of Appeals, including the one which affirmed the decision in the instant case, has ruled one way or the other on the issue here sought to be reviewed.

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## POINT III

### This Case Involves No Important Question of Federal or Constitutional Law

Petitioner seeks review on a Writ of Certiorari of a judgment of the District Court and a unanimous Court of Appeals, but has not indicated any "special or important reasons" therefor as required by Rule 19 of this Court, and in point of fact there are none.

Petitioner does not rely on any of the specific reasons set forth in Rule 19(1)(b), but requests that this Court resolve a hypothetical legal proposition which is not supported by the facts and findings contained in this record.

Petitioner's actual attack on the judgment below is not upon any legal determination which this Court may properly consider, but rather upon the factual finding that there was no age discrimination. Such a factual issue is important only to the particular parties involved as distinguished from the general public, and hence are not "important" as interpreted by this Court as a requisite for the granting of a Writ of Certiorari. Rice v. Sioux City Cemetery, 349 U.S. 70, 79 (1955). Similarly, the charges noted in Petitioner's second point are conclusory, undocumented, and were fully reviewed by

the Court of Appeals. There is no basis for this Court's taking the case to review Petitioner's claim of an unfair trial, particularly in light of his failure to move for a new trial and in light of the Court of Appeal's unanimous affirmance. This Court does not and should not grant writs merely to give the defeated party in the court below another hearing. Magnum Co. v. Coty, 262 U.S. 159, 163 (1923); Ferguson v. Moore-McCormack Lines, Inc., 352 U.S. 521, 531 (1957) dissent of Frankfurter, Jr.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Dated: December 18, 1972

Respectfully submitted,

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New York, New York
Counsel for Respondents
Walsh, Reiss and Roth

# APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 43, 237 September Term 1971

Argued: September 27, 1971 Decided: October 29, 1971

Docket Nos. 71-1398, 71-1852

- - - - - - - - - - - - - - - - - - -

PAUL WEISS,

Plaintiff-Appellant,

-against-

Reverend MICHAEL WALSH, S.J., in his capacity as President of Fordham University; PAUL J. REISS, in his capacity as Vice-President for Academic Affairs of Fordham University; ROBERT ROTH, S.J., in his capacity as Chairman of the Department of Philosophy of Fordham University; and EWALD B. NYQUIST, in his capacity as Commissioner of Education of the State of New York,

Defendants-Appellees.

- - - - - - - - - - - - - - - - - - -

Before LUMBARD, MANSFIELD and OAKES, Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Harold R. Tyler, Judge, denying plaintiff's motion for a preliminary injunction restraining defendants from withdrawing alleged offer to him of the Albert Schweitzer Chair of Humanities at Fordham University or from offering it to anyone other than plaintiff.

Affirmed.

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MANSFIELD, Circuit Judge:

Paul Weiss, an outstanding scholar and distinguished Professor of Philosophy, appeals pursuant to 28 U.S.C. §1292(a)(1) from the district court's denial of a preliminary injunction which would, among other things, enjoin defendants from withdrawing the alleged offer to him of a professorial chair or seat known as the Albert Schweitzer Chair in Humanities (the "Chair"), created by §239 of the New York Education Law and awarded by the State of New York to Fordham University ("Fordham"). For the reasons hereinafter stated we affirm.

In an action commenced in the district court on October 29, 1970, Weiss sought a declaratory judgment, injunctive relief, and $1,000,000 damages based on defendants' alleged violation of the federal Civil Rights Act, 42 U.S.C. §1983. The court's jurisdiction was invoked pursuant to 28 U.S.C. §1343(3), (4). The first cause of action of the complaint claims that after Weiss, then 69 years old, accepted Fordham's offer of the Albert Schweitzer Chair, subject to approval by the New York State Education Department, the defendant Reiss, Fordham's Vice President for Academic Affairs, stated that the State Board of Education had informed him that "they would not grant funds to the Albert Schweitzer Chair if a man of plaintiff's age was appointed but that they would give the Albert Schweitzer Chair to Fordham" (Compl. Par. 5). It is alleged that thereafter defendants, in violation of Weiss' First, Fifth, and Fourteenth Amendment rights, discriminated against him on the basis of his age by withdrawing the offer. Additional causes of action sought relief on the ground that defendants' conduct violated §239 of the New York Education Law, §3027 of the New York Education Law, §2577 of the New York Public Authority Law, The Older Americans Act of 1965 (79 Stat. 218, 42 U.S.C. §§3001, et seq.), and §296 of the New York Executive Laws. Attached to the complaint were relevant letters selected from correspondence between Weiss (or his representative) and Fordham officials during the period from April 22, 1968 to October 22, 1970.

Defendants filed answers denying, among other claims, that Fordham made an offer of the Chair to Weiss or that he accepted such an offer. They further allege that the Chair was not offered to Weiss because Fordham had "determined to nominate someone else for that position" and that Weiss had committed himself to work for another institution, thereby disabling himself from accepting such an offer

from Fordham if it should be made.

After defendants moved for judgment on the pleadings, Weiss on January 12, 1971, moved for preliminary injunctive relief. Except for copies of certain letters attached to the complaint, the authenticity of which was not denied, no affidavit, testimony or other proof was offered in support of Weiss' application. He was apparently content to rely entirely upon the letters, since all other material allegations had been denied. On February 5, 1971, at the conclusion of oral argument, Judge Tyler granted defendants' motion in part and denied Weiss' application for preliminary injunctive relief, stating:

> "I am going to deny the motion for injunctive relief because there is an extreme unlikelihood of any success whatsoever on the part of the plaintiff in establishing either his first cause of action, or indeed, any substituted claim that he can make, even one for breach of contract. Not only that, it would be a grave intrusion upon the affairs of Fordham University if this Court, or any other Court that I could think of, were ever to issue an injunction pendente lite requiring Fordham University and the State of New York to refrain to fill any Schweitzer Chair which has been allotted to Fordham University.
>
> "Moreover, I might point out that the plaintiff is undoubtedly not entitled to the very relief which he would only really be entitled to after he succeeded in a trial, and I am highly doubtful whether he will ever be entitled to a trial here on grounds of law."

In an opinion filed on February 25, 1971, which appears at 324 F. Supp. 75, Judge Tyler reaffirmed his denial of preliminary injunctive relief, stating "that plaintiff has failed to show sufficient likelihood of success to warrant freezing the status quo" and partially dismissed the complaint on the ground that it failed as a matter of law to state claims for relief except for claims based on selective or discriminatory application of age criteria, or on conduct in excess of authority delegated to defendants by statute.

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After filing an amended complaint (not part of the record before us), Weiss again moved on July 27, 1971, for preliminary injunctive relief enjoining defendants from spending "funds of the Albert Schweitzer Chair to pay for present faculty stipends and any lecture, seminar, or symposium series or in any way using the funds other than offering the chair to a permanent appointment." The application was denied by Judge Tyler in open court on July 30, 1971, for failure to show that the expenditures would violate applicable state law.

Upon this interlocutory appeal the principal issue is whether the district court's denial of preliminary relief amounted to an abuse of discretion. Clairol, Inc. v. Gillette Co., 389 F.2d 264 (2d Cir. 1968); Societe Comptoir De L'Indus. v. Alexander's Department Stores, Inc., 299 F.2d 33 (2d Cir. 1962). In resolving that issue we recognize that in seeking preliminary relief plaintiff assumed the burden of showing probable success on the merits and possible irreparable injury to himself or, if his showing of probable success should be a limited one, that the balance of hardships tipped decidedly in his favor. Checker Motors Corp. v. Chrysler Corp., 405 F.2d 319, 323 (2d Cir. 1969); Dino De Laurentiis Cinematografica, S.p.A. v. D-150, Inc., 366 F.2d 373, 375 (2d Cir. 1966). In the absence of serious issues of fact such a showing may be made through affidavits. But where material facts are disputed an evidentiary hearing is essential in the interests of fairness and accuracy. SEC v. Frank, 388 F.2d 486, 490 (2d Cir. 1968); Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197, 1204 (2d Cir. 1970).

The record before us is barren of any showing of probable success. Plaintiff did not offer any affidavit proof, much less seek an evidentiary hearing. Thus, in the face of defendants' denial of the material facts, the only uncontroverted evidence is the correspondence attached to the complaint and certain letters attached to Weiss' reply brief as an "Appendix."* This meager evidence fails to make a persuasive showing of the essential threshold facts upon which Weiss' claim depends, i.e., that Fordham

* These letters do not appear to be a part of the record before the district court and would not ordinarily be considered by us. However, they have not been controverted by defendants.

offered him the Chair and that he accepted such an offer. By letter dated April 22, 1968, Arthur W. Brown, Dean of Fordham's Graduate School of Arts and Sciences, advised plaintiff that Fordham planned to offer him the Chair if the funds for it should be allotted by the State to Fordham. Since the State, however, had not allotted the Chair to Fordham and no resources were available, Brown suggested to Weiss that he "take the best offer you have received from elsewhere," adding that if the Chair became available "we shall be at your door again." Thus the letter appears to have been merely a statement of intention. Indeed it was so construed by Weiss in his letter of October 1, 1968, to "Bob" (apparently Robert J. Roth, S.J., Chairman of Fordham's Philosophy Department), in which Weiss stated that his own impending acceptance of another post elsewhere "will not preclude my accepting the Schweitzer Chair at some future time, I think. I will be ready for it, if and when it is offered to me." (Emphasis supplied).

The record before us contains no other evidence relating to an offer of the post until defendant Reiss' letter of September 3, 1970, which disclosed that Reiss understood Brown's 1968 correspondence merely to have indicated "the University's intention, at that time, to nominate you for the Chair" and advised Weiss that he was not to be nominated for the post. In summary, the correspondence between the parties reveals that, while Fordham thought highly of Weiss and indicated in 1968 an intention to offer him the Chair if it should become available, it did not ever make him an offer, and it eventually decided, two and one-half years later, not to do so.

There remains the question of whether Weiss could prove that the decision not to nominate him for the Chair was prompted by discriminatory action on the part of the State of New York or its representatives. Here again the sole evidence proffered is inadequate. Although the correspondence relied upon by Weiss indicates that one reason for not offering the Chair to him may have been his advanced age, it is equally consistent with defendants' contention that Fordham was merely adhering to its regular retirement policy and regulations in effect since 1947, which established a retirement age of 65 years for all members of its faculty, with employment on a half-time basis thereafter being permitted in exceptional cases at the discretion of the Academic Vice President, but in no event to extend beyond the end of the academic

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year during which the faculty member might attain the age of 70. Weiss was 69 years of age at the time of the September 1970 correspondence. The letters of Fordham's administrators indicate that since "The Schweitzer Professor is expected to be appointed in accordance with the University's normal faculty policies" and the State would "assume that an appointee will hold the Chair for an extended period of years," an appointment of Weiss would constitute such a radical departure from Fordham's own university-wide retirement regulations that the State Education Department would refuse to approve it. If these letters, which represent the only evidence before us, were the sole proof offered by Weiss at trial, it would be a far cry from proving discriminatory action on the State's part.

Aside from his failure to establish the likelihood of success on the merits, Weiss has offered no evidence that he will suffer irreparable injury unless a preliminary injunction is granted. It is not surprising to find that as an outstanding scholar in the field of philosophy he has for some time been employed as the Heffer Professor of Philosophy at the Catholic University of America, Washington, D.C. This employment militates against his claim that denial of the Chair causes him irreparable harm. In such a setting damages would provide an adequate remedy. Furthermore, to force him upon an unreceptive administration at Fordham would amount to a disruptive intrusion upon that academic community; and to restrain Fordham during the pendency of the suit from appointing another outstanding academician to the post would deprive the public and the academic community of essential benefits to be derived from utilization of available funds, talents and facilities in an important area of higher education.

In view of Weiss' failure to show any abuse of discretion on the part of the district court in denying preliminary injunctive relief, it becomes unnecessary for us to pass upon the constitutional and other legal issues raised by Weiss and amici curiae, which formed the basis for the district court's partial dismissal of the complaint. That order, not being appealable, is not now before us.

The district court's order is affirmed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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PAUL WEISS,

Plaintiff,

-- against --

Rèverend MICHAEL WALSH, S.J., in his capacity as President of Fordham University; PAUL J. REISS, in his capacity as Vice-President for Academic Affairs of Fordham University; ROBERT ROTH, S.J. in his capacity as Chairman of the Department of Philosophy of Fordham University; EWALD B. NYQUIST, in his capacity as Commissioner of Education of the State of New York; JOSEPH W. McGOVERN, EVERETT J. PENNY, KENNETH B. CLARK, CARL H. PFORZHEIMER, JR., CHARLES W. MILLARD, JR., JOSEPH C. INDELICATO, EDWARD M. M. WARBURG, MRS. HELEN B. POWER, JOSEPH T. KING, ALEXANDER J. ALLAN, JR., FRANCIS W. McGINLEY, MAX J. RUBIN, THEODORE M. BLACK, STEPHEN K. BAILEY, and HAROLD E. NEWCOMB in their capacities as Regents of The University of the State of New York,

Defendants.

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Civil Ac
No. 476

AMENDED
COMPLAI

1. Jurisdiction is based on 28 U.S.C. §§1331, 1332, 1343(3) and (4), 1361, 2201 and 2202.

2. Plaintiff is a citizen and resident of the District of Columbia and Defendants are citizens of the State of New York. The matter in controversy exceeds, exclusive of costs and interest, the sum of $10,000.

First Cause of Action

3. Reverend Michael Walsh, S.J. is President of Fordham University and responsible for its final policy and decisions.



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4. Paul J. Reiss is Vice-President for Academic Affairs of Fordham University and responsible for offering and applying for the Albert Schweitzer Chair.

5. Robert Roth, S.J., is Chairman of the Philosophy Department and responsible for its administration.

6. Ewald B. Nyquist is Commissioner of Education of the State of New York and finally responsible for the administration of the funds for the Albert Schweitzer and Albert Einstein Chairs created by §239 of the Education Law of New York.

7. Joseph W. McGovern, Everett J. Penny, Kenneth B. Clark, Carl H. Pforzheimer, Jr., Charles W. Millard, Jr., Joseph C. Indelicato, Edward M. M. Warburg, Mrs. Helen B. Power, Joseph T. King, Alexander J. Allan, Jr., Francis W. McGinley, Max J. Rubin, Theodore M. Black, Stephen K. Bailey, and Harold E. Newcomb are Regents of the University of the State of New York (hereafter collectively referred to as "The Regents") and responsible, on information and belief, for the approval or disapproval of individuals suggested for the Albert Schweitzer Chair by applicant colleges and universities, and, in addition, for entering contracts with respect to the Albert Schweitzer and Albert Einstein Chairs.

8. Plaintiff is 69 years of age, a Heffer Professor of Philosophy at Catholic University of America, and in excellent physical and mental health.

9. On information and belief, Fordham University, through its officers and employees, including the named defendants, selected plaintiff as the sole recipient of the Albert Schweitzer Chair awarded to Fordham on or about April 22, 1968. This identification was made to appropriate persons in the State Department of Education, which is under the authority and control of defendants Nyquist and the Regents and communicated to plaintiff who accepted his selection and made plans accordingly.

10. On information and belief, an official at the State Department of Education informed Fordham that they would reject plaintiff as a recipient of the Albert Schweitzer Chair solely because of his age.

11. Fordham University has as a consequence of the communication from the State Department since refused to employ defendant as a recipient of the Albert Schweitzer Chair and have now said although he was the selection and did accept the post they refuse to honor said commitment.

12. On information and belief, candidates for the Albert Schweitzer and Albert Einstein Chairs who are older than sixty-five years of age are automatically excluded from qualification for these Chairs.

13. Nevertheless, on information and belief, there have been recipients of Albert Schweitzer and/or Albert Einstein Chairs who have already attained the age of sixty-five. In addition, on information and belief, the age qualification for Albert Schweitzer and Albert Einstein Chairs is applied on an ad hoc and not a rational basis.

14. As a result, plaintiff has been denied the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution and has been damaged thereby.

Second Cause of Action

15. Plaintiff restates the allegations in each and every allegation in paragraphs 1 through 12 above with the same force and effect.

16. On information and belief, the New York State Legislature did not intend to, and in fact did not, insert a maximum age provision in the legislation creating the Albert Schweitzer and Albert Einstein Chairs but that the policy of selecting people of great distinction would inevitably lead to the selection of scholars of the plaintiff's age and much older.

17. In interjecting an age qualification, the defendants Nyquist and The Regents, and those acting for them, exceeded their statutory authority and plaintiff has been damaged thereby.

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18. Alternatively, on information and belief the interjection of the age limitation was done by an anonymous administrator within the State Department of Education and without the prior approval of the defendant's Nyquist or The Regents. This action was unlawful both in statutory and administrative authority and irregular and plaintiff has been damaged thereby.

Third Cause of Action

19. Plaintiff restates the allegations in paragraphs 1 through 11 above with the same force and effect.

20. On information and belief, Fordham University, through its officers and employees, including the defendants, offered plaintiff an Albert Schweitzer Chair and this offer was accepted.

21. Nevertheless, Fordham University refused, in breach of contract, to grant plaintiff an Albert Schweitzer Chair and plaintiff has been damaged thereby.

WHEREFORE, plaintiff respectfully prays that the Court:

1. Assume jurisdiction of this cause and set this case down promptly for a hearing.

2. Enter a final judgment pursuant to 28 U.S.C. §§2201 and 2202 declaring that the failure of Fordham University to give to plaintiff the Albert Schweitzer Chair offered to him and accepted by him, violates plaintiff's rights under the Fourteenth Amendment to the United States Constitution and under 42 U.S.C. §1983.

3. Enter final judgment pursuant to 28 U.S.C. §§2201 and 2202 declaring that the State Department of Education exceeded its statutory authority when, through the defendants Nyquist and The Regents, or alternatively through an anonymous administrator, it injected an age limitation on the grant of an Albert Schweitzer Chair to plaintiff.

4. Enter a permanent injunction pursuant to Rule 65 of the Federal Rule of Civil Procedure enjoining Defendants, other successors in office, agents, and employees and all other persons in active concert and participation with them from refusing to give

the Albert Schweitzer Chair to plaintiff until he chooses to retire from it.

5. Grant plaintiff one million dollars ($1,000,000) pursuant to Rule 34(d) in compensatory and punitive damages, together with interest and costs of this action.

6. Grant such additional or alternative relief as to the Court may deem just and proper and equitable.

Respectfully submitted

/s/ Jonathan A. Weiss
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